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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA,

Appellant,

v.

GENERAL MOTORS CORPORATION; LOSOR CHEVROLET DEALERS ASSOCIATION; DEALERS' SERVICE, INC.; AND FOOTHILL CHEVROLET DEALERS ASSOCIATION,

Appellees.

On Appeal from the United States District Court for the Southern District of California, Central Division.

MOTION OF APPELLEE GENERAL MOTORS CORPORATION TO AFFIRM

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IN THE

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OCTOBER TERM, 1964

No. 820

UNITED STATES OF AMERICA,

Appellant,

v.

GENERAL MOTORS CORPORATION; LOSOR CHEVROLET DEALERS ASSOCIATION; DEALERS' SERVICE, INC.; AND FOOTHILL CHEVROLET DEALERS ASSOCIATION,

Appellees.

On Appeal from the United States District Court for the Southern District of California, Central Division.

MOTION OF APPELLEE GENERAL MOTORS CORPORATION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, General Motors Corporation moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the District Court dated September 14, 1964, in a civil antitrust case. The District Court held, after trial, that appellees did not engage in the alleged combination to suppress competition in the sale and distribution of

Chevrolet automobiles in the Southern California area in violation of Section 1 of the Sherman Act.*

A more complete Statement of the case than that contained in the Jurisdictional Statement is necessary for consideration of the Question Presented.

1. **The Chevrolet franchise plan of marketing.**

Chevrolet dealerships are locally owned and operated by independent businessmen under franchise agreements with Chevrolet.** Among the rights granted by these franchise agreements, called "Dealer Selling Agreements," are the non-exclusive right to purchase new Chevrolets at dealer prices and the right to re-sell them in a manner which will promote sales and preserve the good will of Chevrolet. The dealers' rights and obligations are personal and not transferable. Chevrolet grants such rights based upon its judgment as to the number of dealer outlets which are necessary for the operation of its franchise plan (Fdgs. 9, 11, 16, 25, 26; GX-1, Exhibits 2-7 thereto; Tr. pp. 423-425).

Under the Dealer Selling Agreements, the location of each dealer must be specifically approved by Chevrolet and the dealer is not permitted to establish an additional location or a branch office or to transfer his sales obligation to others without the prior written approval

*The identical issue was presented to a different judge of the Southern District of California in an earlier trial upon an indictment returned against appellees here and four Chevrolet officials. After four months of trial, the Court granted a judgment of acquittal at the conclusion of the Government's case. 216 F.Supp. 362 (1963) (opinion and judgment).

**General Motors Corporation manufactures and distributes Chevrolets through its Chevrolet Motor Division (herein called "Chevrolet").

of Chevrolet. The location clause was adopted by Chevrolet in 1940 and is uniformly included as a part of all General Motors Dealer Selling Agreements. It was not adopted at the instigation or inducement of the dealers. On the contrary, it was developed by General Motors exclusively to serve its own interests, following many years of market analysis and practical experience. In adopting the clause, General Motors' aim was to insure that its careful planning to achieve the optimum coverage of the market and thus to further competition with other makes would not "be defeated by the haphazard actions of individual dealers" in establishing additional outlets (App. B to Tr., p. 83; Tr. 255-256; 333-337; 556).

Chevrolet dealers have complete freedom to sell at any price they choose and they do. General Motors exercises no control whatsoever over the dealers' pricing of their cars (Fdg. 10; Tr. 343-344; 627). They have complete freedom to sell to any customer wherever he may be located and they do. No class of customers is excluded. "Cross-selling" is not prohibited; there is no geographical or territorial barrier — neither territorial security nor territorial exclusivity.* The customer can purchase his Chevrolet from any dealer anywhere at any price he can negotiate. (Tr. 342-344; 624; App. C to Tr. p. 61.)

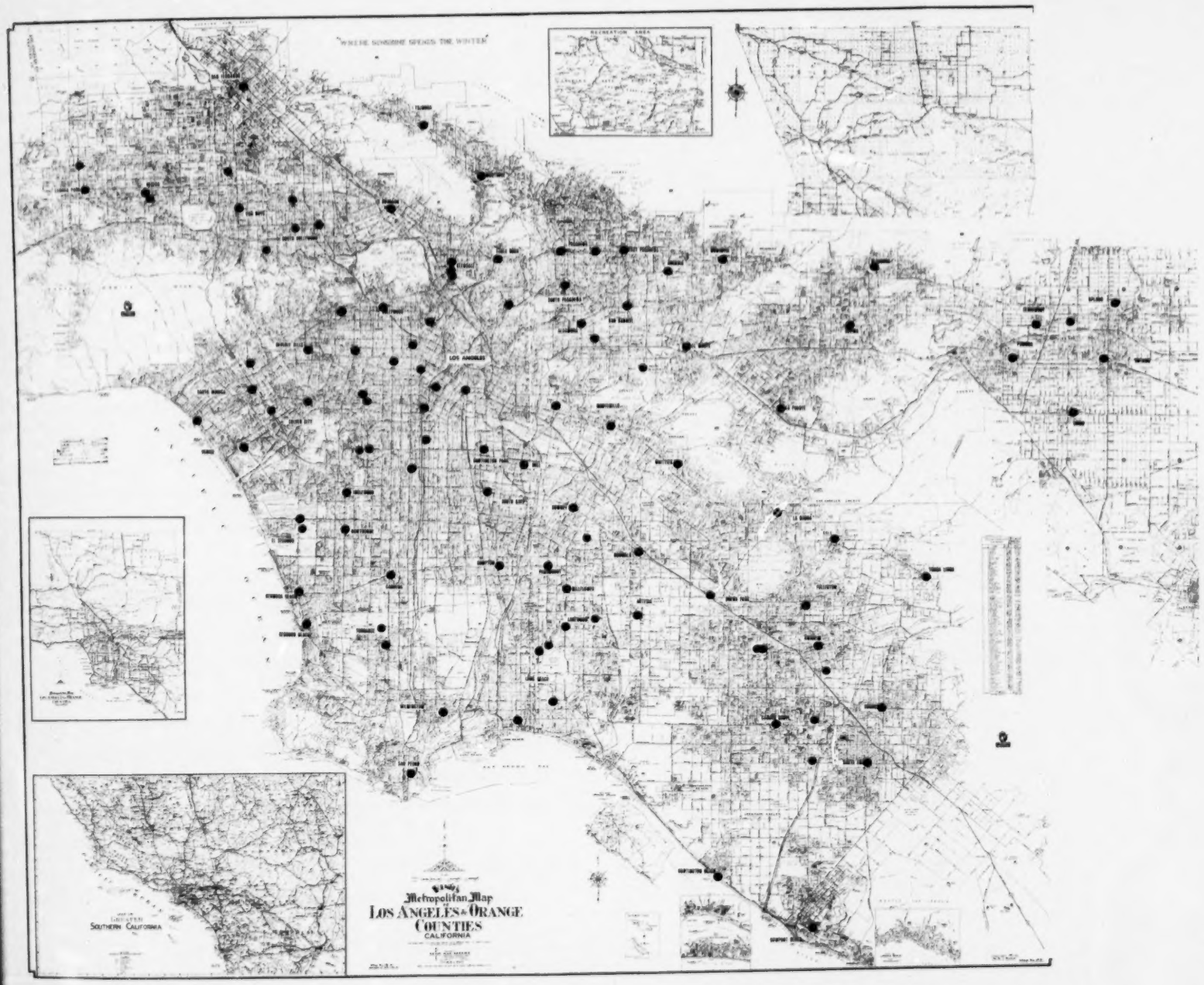
Under the Chevrolet franchise plan, Chevrolet appoints what its studies show are the right number of dealers located in the right places to make sales and service facilities and parts supplies conveniently available to consumers (Tr. 423-425; 631-632; 337; App. B to Tr. p. 91).

* Unlike the contracts which were the subject of *United States v. White Motor Co.*, 272 U. S. 253.

Such strategic location of dealers is essential because Chevrolets kept in proper working order at conveniently located service facilities keep customers satisfied and satisfied customers, as repeat buyers, constitute 70% of the purchasers of new Chevrolets (Tr. 259-260). It is also essential because it enables Chevrolet to achieve a needed continuity of representation by providing for each dealer a sales potential adequate to enable him to continue in business if he competes vigorously and effectively.

This continuity affords Chevrolet representation year in and year out, in the peaks and valleys caused by business cycles and model changes. It is important to Chevrolet not only because the dealer can thereby provide conveniently located sales and service facilities and parts supplies to consumers, but also because he can perform ancillary functions such as conditioning cars for delivery, remedying latent defects which occassionally occur in mass production, performing warranty obligations, and making the market estimates which close contacts with consumers make possible and which are required for orderly manufacturing schedules (Fdgs. 11-13; Tr. 308-366; 423-425; App. B to Tr. pp. 68-86).

The locations of the 85 Chevrolet dealers throughout the Los Angeles Metropolitan Area (which includes most of Los Angeles and Orange counties and is the area involved in this action) are graphically shown on the map (GMX-A) reproduced as an insert between this page and the next page. The blue dots are Chevrolet dealers; the red dots are discount houses and referral services used by some of the Chevrolet dealers.



Los Angeles Metropolitan Area

Under the Chevrolet franchise plan, each dealer has the obligation to develop the sale of Chevrolets in his "area of sales responsibility." In the Los Angeles Metropolitan Area, each dealer's "area of sales responsibility" is the entire metropolitan area (GX-1, Par. 17). This means that the 85 Chevrolet dealers in the area must compete for customers throughout the entire area. Under the plan, each dealer's location gives him an opportunity of contact with customers in his neighborhood, but if he does not meet or beat the prices and other competitive efforts of the other 84 dealers, he will be unable to capitalize on this opportunity (Fdg. 17). Thus, the plan is based on the principle of vigorous competition between dealers under a marketing plan in which each operates from an agreed location and may not transfer his selling obligation to others.

As shown by the map, there is an average of five other Chevrolet dealers within five miles of each of the 85 Chevrolet dealers in the Los Angeles Metropolitan Area (GMX-J). In addition, within the five mile area there is an average of 22 dealers in competing makes of new cars, exclusive of competing General Motors makes (GMX-B and J). There is intense *intrabrand* competition — primarily price and service competition — among Chevrolet dealers, and there is intense *interbrand* competition — as to price, service, style and performance — between Chevrolet dealers and dealers for all other makes of automobiles (Fdgs. 28-29).

Upon the basis of uncontradicted evidence, the trial court found the facts to be:

"The Chevrolet franchise system with its location restrictions and its restrictions against transferring or assigning to third parties sales and service obligations promotes rather than impairs competition in the retail sale of Chevrolet automobiles and benefits the purchasing public. It enhances Chevrolet's ability to compete with other manufacturers, promotes the competition of Chevrolet dealers with dealers selling rival makes and promotes the competition of Chevrolet dealers with each other." (Fdg. 33)

2. **Chevrolet dealers' use of unauthorized outlets.**

In the early summer of 1960, some Chevrolet dealers in the Southern California area were selling new Chevrolets pursuant to agreements under which unauthorized outlets (discount houses*) performed many of the merchandising functions normally performed by Chevrolet dealers. These discount houses, which operated at locations removed from the approved location of the Chevrolet dealer involved, maintained new car sales departments which advertised Chevrolets and distributed Chevrolet promotional literature (Fdgs. 18-19).

In every case, the sale of the new Chevrolet to the customer was made by the Chevrolet dealer *through* the discount house with title passing directly from the dealer to the customer. In no case did the dealer sell *to* the discount house, and in no case did the discount house make a resale (Fdg. 19).

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* As does appellant, we shall use the words "discount houses" to cover both discount houses and referral services.

(a) Prices of sales through discount houses.

The sale of Chevrolets through these unauthorized outlets did not enable the dealers who used them to sell at lower prices than they sold directly to their ordinary customers, and thus the additional outlets were not "discount houses" in the usual connotation of that term as an outlet which sells for less. The evidence is, and the trial court found:

> "As shown by an independent study made by Price Waterhouse & Co., there was no appreciable difference between the prices paid by customers who purchased Chevrolet passenger cars from a dealer through a discount house or referral service and the prices paid by ordinary retail customers who purchased directly from that dealer. (Fdg. 31)

The Price Waterhouse & Co. study, which took more than 10,000 man hours to complete, concerned the 1960 sales of the seven dealers who sold almost all (96%) of the Chevrolets which were sold through discount houses. The median price at which those dealers sold directly to ordinary customers was $220 over dealer's invoice cost, while the median price at which they sold to customers through discount houses was $235 over dealer's invoice cost (GMX-DB). Appellant asserts that Chevrolet dealers sold Chevrolets through discount houses "often for only $165 more than dealer's invoice cost" (J.S. 3). The fact is that in 1960 the dealers studied by Price Waterhouse & Co. sold 1461 (or 24.5%) of their total direct sales of 5970 cars to ordinary customers for $165 or less over dealer's invoice cost, whereas they sold 143 (or 10.7%) of their total sales of 1336 cars

through discount houses at $165 or less over dealer's invoice cost (GX-212).

Chevrolet dealers "almost always sold at a discounted price from the manufacturer's suggested list price, which, as a matter of law, has to be stated and affixed to each car" (Tr. 436). The uncontradicted evidence is that if a customer is not satisfied with the prices quoted by one dealer, he can go to another conveniently located dealer. Since the Los Angeles Metropolitan Area is interconnected by a web of high speed freeways, every person in the entire area has easy access to many dealers, including one or more of the seven dealers studied by Price Waterhouse & Co. from whom customers, on the average, could purchase Chevrolets at lower prices than through discount houses (GMX-A). By the same token, dealers solicit customers on an area-wide basis.

Statements as to isolated discount house prices in some of the letters and telegrams of complaint by dealers and salesmen were double hearsay and were not offered or received in evidence as proof of prices at which Chevrolets were sold through discount houses (Tr. 226-235). At the trial, counsel for appellant stated that such letters and telegrams were not offered "to establish the fact that the discount houses were, in fact, selling for less than the dealers" (Tr. 232). The Price Waterhouse & Co. study is the only evidence in the record of the prices of dealers' direct sales to ordinary customers as compared to their sales through discount houses, and, as stated above, it shows that the customer did not receive a price advantage in buying from dealers through discount houses rather than directly from such dealers.

The prices charged on sales through discount houses had nothing to do with General Motors' decision to urge dealers not to use discount houses as additional sales outlets (Fdg. 38). However, in view of the statements made by appellant (J. S. 14-15), it is worth noting that, rather than promoting price competition, arrangements between dealers and discount houses in many instances inhibited both interbrand and intrabrand competition. At FEDCO, the largest discount house automobile operation in the area (Dealers Diversified Services, Inc.) had a "one-price policy" (App. B to Tr., p. 30). Under the uniform written agreement with the discount house (which was also used for dealers in Ford, Plymouth, Rambler and other competitive makes of cars), each Chevrolet dealer doing business with FEDCO was obligated to sell to customers referred by the discount house at the same specified price over dealer's invoice cost (Fdg. 32; GMX-AP; App. B to Tr., pp. 23-30). The adverse effect of these arrangements upon price competition is shown by the fact that in 1960 there were only four Chevrolets sold through FEDCO at $165 or less over dealer's invoice cost — not even 1% of the 594 sales through FEDCO — whereas 18.7% of the 1243 direct sales to ordinary customers made by the dealers concerned were at $165 or less over dealer's invoice cost (App. B to Tr., 27; GX 145-152; 212; GMX-AP). Fleet Sales Company (the second largest discount house automobile operation in the area) also had a "one-price" arrangement with each of three Chevrolet dealers. These dealers were obligated to quote the "prearranged prices" on a "take it or leave it basis" and could not negotiate lower prices with the referred customers even though the failure

to do so might result in the loss of the sale (App. B to Tr., pp. 9, 35-38). It is significant that 60% of all the Chevrolets sold through what appellant calls a "new form of merchandising in the automobile industry" (J.S. 10) were sold through these two discount houses operating under "one-price" plans (GX-212).

(b) Effect of sales through discount houses.

By 1960, there were 23 discount house outlets in the Los Angeles Metropolitan Area through which Chevrolets were being sold.* These discount houses were outlets or locations for the merchandising of Chevrolet dealers' new Chevrolets in addition to the outlets whose number and location had been determined by Chevrolet as optimum for the proper operation of its franchise plan. They were a way of accomplishing that which was prohibited by the provision of the Dealer Selling Agreements requiring dealers to refrain from establishing additional locations or branch sales offices without the written approval of Chevrolet (Fdgs. 20, 26; App. A to Tr. pp. 89-90). The use by Chevrolet dealers of discount house outlets also defeated the purpose of the provisions of the Dealer Selling Agreement that the agreement is a personal service contract and that each dealer is prohibited from transferring or assigning his sales obligations to third parties (Fdgs. 26-27; GX-1, Exh. 2.1-2.3; App. A to Tr. 89-90).

General Motors' experience has been that adding dealer points for the same sales potential results in dealer mor-

* As shown by GX-1, the 23 discount house locations were dispersed throughout the metropolitan area and only five were located in Orange County (compare J.S. 4).

talities. This prior experience indicated that Chevrolet dealers' use of discount houses as outlets for the sale of new Chevrolets would cause the withdrawal from business of a substantial number of Chevrolet dealers. (App. A to Tr., pp. 87-90; App. B to Tr., pp. 76-77; Tr., pp. 375, 379-382; 437; 632-634). As shown by a study made by Price Waterhouse & Co., the first ones to go would be the smaller dealers (App. C to Tr., pp. 5-6; 10-21; 116), leaving the larger dealers, haphazardly located, with their discount house satellites (Tr. 380-381).

Discount houses do not provide Chevrolet with the kind of retail selling organization needed for Chevrolet's competition with its rivals. They do not promote Chevrolet sales, and Chevrolet cannot depend upon them to provide an active and aggressive sales effort year in and year out through the peaks and valleys (App. B, Tr. p. 30; Tr. 380-382). They cannot provide convenient service facilities or parts supplies to Chevrolet owners. They cannot be relied upon to provide, directly or through the dealers under which they operated, the expert and detailed market information required for orderly manufacturing scheduling (Tr. pp. 416-423).

3. **Action taken by General Motors to stop dealers' use of discount houses as additional sales outlets.**

The use of discount houses as sales outlets as a regular practice by some Chevrolet dealers in the Southern California area was first brought to the attention of the General Motors executives in Detroit in November, 1960,

when they received a large number of letters and telegrams from Southern California dealers and salesmen (Tr. pp. 440-442). Many were Chevrolet dealers; others were dealers in other makes of General Motors cars (Tr. p. 444). They made various complaints and asked General Motors and Chevrolet to bring the practice to an end.

General Motors thereupon made its own investigation and study of the use of discount houses as sales outlets by dealers for all makes of General Motors cars in Southern California and other areas. No dealers or dealer organizations were consulted (Tr. pp. 444-445; 448; 605).

Upon the basis of this study, General Motors, acting under the direction of its Vice President in charge of distribution and with the approval of its President, on December 14, 1960, formulated the corporation's position in a letter which was thereafter sent to all Cadillac, Oldsmobile, Buick, Pontiac and Chevrolet dealers in the United States numbering over 15,000. The letter expressed the corporation's opposition, in the light of the dealer's obligations under their Dealer Selling Agreements, to arrangements by dealers with discount houses for the sale of the dealers' new cars through such discount houses. It pointed out that such practices could represent the establishment of a second and unauthorized sales outlet or location contrary to the provisions of the Dealer Selling Agreements. It advised that personnel of the several motor car divisions were being instructed to meet with General Motors dealers for the purpose of attempting to induce and per-

suade each such dealer to refrain from entering into arrangements for the sale of new General Motors cars through discount houses in violation of his Dealer Selling Agreement (App. A to Tr. pp. 76-77; GMX-AU and AV; Tr. pp. 447-448; 451-452).

Thereafter, individuals representing the appellee dealer associations, acting independently of General Motors, shopped discount houses in the Los Angeles Metropolitan Area, and by purchasing new Chevrolets from some dealers through discount houses found that some dealers were continuing to use discount houses as sales outlets. They so informed the Los Angeles Zone Office of Chevrolet which brought each shopped car to the attention of the dealer who sold it and asked him whether he wished to repurchase the car. The Zone Office, realizing that dealers employ many salesmen, recognized that "it was quite possible for a car to get away from a dealer without him knowing anything about it" and regarded this as a "very effective means of bringing to the attention of the dealers" that this had happened (Tr. 745-746, 896). This was a way of showing the dealers that "there was a possible violation of the selling agreement" and of trying to "persuade them to stop it" (Tr. 786).

The District Court heard the testimony of the President of General Motors and the Vice President in charge of distribution who acted for the corporation in this matter, as well as the Los Angeles Chevrolet Zone Manager who was in charge of carrying out the corporation's instructions. Having seen the witnesses and observed their demeanor, the court expressly found that General

Motors had acted independently and without combination, conspiracy or concert of action with the Chevrolet dealers or the appellee dealer associations (Fdgs. 37 and 45).

At the conclusion of the testimony and argument, the District Court announced its opinion and decision in favor of appellees and directed that the proposed findings which had been lodged by appellees with the Court prior to argument should be consolidated and modified to reflect the gist of his opinion (J.S., App. A, p. 11a). Thereafter, revised findings of fact were lodged by appellees, and appellant filed objections on September 10, 1964. The District Court made modifications of the findings in response to the objections, added a paragraph to the conclusions and signed and filed the Findings of Fact and Conclusions of Law on September 14, 1964. (J.S., App. B).

ARGUMENT

Appellant's complaint alleged that General Motors was engaged in a "combination and conspiracy to suppress and eliminate competition in the sale and distribution of Chevrolet automobiles in the Southern California area" (Par. 16). The Jurisdictional Statement is built on the *assumption* that there was such joint action between General Motors and its franchised Chevrolet dealers, and that such joint action was proved. This assumption is reflected in the Question Presented which refers to "an arrangement" between General Motors and the Chevrolet dealers and is even more apparent in the appellant's repeated but unsupported references to the "joint efforts"

of General Motors and the Chevrolet dealers (J.S., 10, 11, 12).

The findings are flatly to the contrary. The District Court found, with overwhelming support in the evidence, that General Motors acted independently — not jointly — to obtain compliance with a valid provision of its Dealer Selling Agreements. Appellant has not challenged these findings as "clearly erroneous" and accordingly they are decisive of the allegation of combination and conspiracy which the Government made but failed to prove.

1. **The District Court found that General Motors acted independently.**

Every Chevrolet dealer has the unconditional freedom to sell Chevrolets "to anyone, anywhere, at any price" (GMX-AY, p. 3; Fdg. 10).* The location clause in the Dealer Selling Agreements, which is of central importance here, merely prevents the dealer from establishing additional locations or branch offices without the prior approval of Chevrolet (see Statement, *supra*, pp. 2-5). General Motors sought to obtain compliance with this clause when it acted in 1960 to persuade Chevrolet dealers to refrain from using discount houses as additional outlets for the sale of the dealers' Chevrolets (Fdg. 36).

* Appellant's argument (J.S. 11) that discount houses should not be precluded from retailing automobiles is beside the point. This case does not involve any restriction on sales by manufacturers or dealers *to* discount houses for resale, as appellant recognizes (J.S. 4), and accordingly the District Court's ruling does not "deny to the automobile buying public the type of discount house selling that has been successfully employed for most other consumer products" (J.S. 11).

Reflecting his oral opinion (J.S. App. A, pp. 9a-10a), the District Judge specifically found such action by General Motors to be independent, not joint:

> ". . . Such action was taken independently and unilaterally by General Motors with respect to each Chevrolet dealer individually, to obtain compliance by each dealer with the obligations he had undertaken in his Dealer Selling Agreement and such action was not taken by General Motors by combination, conspiracy or concert of action with Chevrolet dealers or any of them or with defendents Losor, Foothill or DSI or any of them." (Fdg. 45)

The District Court also found that the "sole motivation" for General Motors action was the preservation of its franchise system (Fdg. 37)*.

To establish the joint action which is the necessary premise of its argument, the Government has the burden of showing that these findings of independent action by General Motors are "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure; *International Boxing Club v. United States*, 358 U.S. 242. Such "findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States v. Yellow Cab*, 338 U.S. 338, 341. On review, they will not be

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* A comprehensive study of the franchise system of distribution made in 1963 by the University of Minnesota for the Small Business Administration found that it results in a "broadening of the economic base of the country by the encouragement of small business". *Lewis and Hancock, The Franchise System of Distribution* (1963), 91.

set aside even though the Supreme Court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States v. Real Estate Boards*, 339 U.S. 485, 495.

2. **The supporting evidence is substantial.**

The finding of independent action is fully supported by the testimony of the General Motors officials who were responsible for the action taken.* The District Judge listened to these witnesses, observed their demeanor, and heard them cross-examined. In several instances, he joined in the questioning on this very point (Tr. 608-609, 786).

In addition to the direct testimony of the responsible General Motors officials, there was an abundance of evidence showing the basis for such independent action.

(a) The location clause.

Under the location clause of the Dealer Selling Agreements, Chevrolet has the sole discretion to permit a dealer to "establish a new or different location, branch sales office, branch service station, or place of business" (G.X.-1, Exh. 7.2). This location clause was developed by General Motors commencing in 1940 to serve exclusively its own interests. It was not adopted at the instigation of the dealers, and they have no reciprocal right to prevent Chevrolet from approving the estab-

* John F. Gordon, President of General Motors (Tr. 599-608); James M. Roche, Vice President in charge of distribution (Tr. 440-458); Robert M. O'Connor, Los Angeles Chevrolet Zone Manager (Tr. 709-787).

lishment of additional dealer outlets (App. B to Tr., p. 83; Tr. 333-334, 556).

The complaint, which charges a combination and conspiracy between General Motors and Southern California Chevrolet dealers and their dealer associations, does not allege that the location clause or any other aspect of the Dealer Selling Agreement is an unlawful vertical agreement. The jurisdictional statement, however, now advances such an argument (J.S. 16-17). If the obligation of Chevrolet dealers to refrain from selling through discount houses as additional outlets is considered a restraint of competition at all, it is so minimal and so contributes to the long-term enhancement of competition that there can be no substantial question of its reasonableness (Fdg. 33; Concl. of Law 1). The one case which has considered the location clause held it to be reasonable and valid. *Boro Hall Corp. v. General Motors Corp.*, 124 F.2d 822 (2nd Cir. 1942); rehearing denied 130 F.2d 196 (2nd Cir. 1942); *cert. denied* 317 U.S. 695; cf. *White Motor Co. v. United States*, 372 U.S. 253, where much more restrictive contractual provisions were held not illegal *per se*.

The minimal location restriction of the Chevrolet franchise plan prevents the sale of Chevrolets in a metropolitan area such as Los Angeles from becoming concentrated in a relatively few large dealers using discount house satellites (Tr. 380-385; App. C to Tr., pp. 5-6, 10-21, 116). The provision against unauthorized outlets, unlike territorial exclusivity or territorial confinement, does not interfere with free and unfettered competition carried on from the locations to which the manufacturer and each

dealer agree.* As the District Court indicated, they are minimum restrictions necessary for the operation of the franchise system (J.S. App. A, pp. 7a-8a).

Indeed, if the location clause is to be struck down as unreasonable, it is difficult to conceive of any provision of an automobile franchise contract that would not meet a similar fate. The standard clauses requiring a dealer to invest a minimum amount of capital, to have a showroom of adequate size, to stock an inventory of parts and accessories, to maintain adequate service facilities, to honor claims under the manufacturer's warranty, and to furnish reports needed by the manufacturer to establish production schedules — all impose some limitation on the freedom of the dealer (GX-1, Exh. 3.2). That imposed by the location clause is no less reasonable. Without these minimum provisions, the modern franchise system — with all it has done to combine the economic benefits of large scale manufacture with the values of independent businesses locally owned and operated — could not survive.

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* Although appellant belatedly charges General Motors with "stabilization of prices" (J.S. 15), the complaint made no such allegation and, at the trial, appellant failed to produce any kind of a price study on which to base such a charge. Far from showing price stabilization by General Motors, the only evidence in the record regarding comparative prices (the Price Waterhouse & Co. study) shows that the sale of Chevrolets through discount houses did not enable the dealers who used such outlets to sell at lower prices than those at which they sold to their ordinary customers. The discount house arrangements made by some dealers did, however, tend to stabilize those dealers' prices (see Statement, pp. 7-10).

The trading of grain in the Chicago grain market presented unique marketing problems and was properly made the subject of a marketing plan with agreed regulations. *Chicago Board of Trade v. United States,* 246 U.S. 231, 238. Automobiles also present unique distribution problems which necessitate use of a plan of marketing. The factors that have impelled all automobile manufacturers to adopt franchise plans of marketing are described in the Findings of Fact (Fdgs. 12 and 15). Under the General Motors franchise plan, all dealers are left free to compete with one another for sales to any person anywhere at any price. The ground rules are the minimum ones necessary to promote such competition. Reasonable ground rules in a marketing plan which promotes and does not suppress competition are not unlawful. *Chicago Board of Trade, supra,* at 238.

(b) Adverse effects of additional outlets.

General Motors had legitimate business reasons of its own for taking action under the location clause to dissuade its dealers from establishing additional dealer outlets at discount houses—reasons having nothing to do with the requests of the Southern California dealers. General Motors makes extensive studies to determine the right number of Chevrolet dealers located in the right places. The number and places so selected enable the dealers to perform the sales and service functions essential to the marketing of Chevrolets and at the same time provide each dealer a sales potential that enables him, operating competitively, to give Chevrolet a continuity of representation in the peaks and valleys of automobile merchan-

dising, year in and year out* (see Statement, supra, p. 2-6).

The trial court found that the failure to restrict the use of discount houses as additional outlets would in time cause the withdrawal from business of a substantial number of Chevrolet dealers, resulting in the haphazard location of the remaining large dealerships with their discount house satellites (Fdg. 22-23). Appellant asserts that these findings are nothing more than "speculative, unsupported conclusions" (J.S., pp. 19-21). However, the evidence shows that General Motors' judgment that additional outlets would impair its franchise system was based upon forty years of study, market analysis, and experience. The lesson of these forty years was that too many outlets in an area in relation to the area's sales potential resulted in dealer mortalities, an inadequate distribution system, poor service, and reduced sales (App. B to Tr., pp. 64-68, 76-77; App. A to Tr., pp. 88-89; Tr. 632-634).

In General Motors' view, the use of discount houses as additional locations do not provide Chevrolet with the kind of retail selling organization needed for Chevrolet's competition with its rivals for the reasons set forth in Finding 24. Because General Motors had its own reasons, it did not consult with any dealer or dealer association in connection with stating its position on sales through

* Because automobile registration data in public records show addresses of new car purchasers and makes of cars purchased, it is possible to calculate with accuracy the Chevrolet sales potential of an area and to determine the optimum number of strategically located dealers for the area (App. B to Tr., pp. 63-72).

discount houses (Tr. 444-449). Moreover, General Motors dealt with the problem on a nationwide basis, stating its position to all of its dealers in the United States for all of its automotive lines, not just to Chevrolet dealers in Southern California as might have been expected if it had engaged in the combination charged (Tr. 448).

Appellant has fallen far short of sustaining its burden of showing that the Court's finding of independent action by General Motors is "clearly erroneous." Indeed, appellant does not address itself directly to this central question but instead advances its own version of the events involved, based upon selected facts not all of which are supported by the record.* The District Court, however, heard all of the evidence and sustained General Motors' view of the facts (J.S., p. 5-7). In short, in two successive trials on the Government's charge of joint action between General Motors and the Chevrolet dealers, "the Government's evidence fell short of its allegations — a not uncommon form of litigation casualty from

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* An illustration is the following passage from the appellant's statement:

> " . . . On December 15, 1960, the officers of the three appellee dealer associations held a joint meeting at which they appointed a committee to find methods of combating discount house selling (G.X. 119). They informed the Los Angeles Chevrolet Zone Office of this action (*ibid.*)
>
> "As a result of this campaign, General Motors decided . . ." (J.S., p. 6).

The record, however, is clear and uncontradicted that the General Motors decision was made on December 14, 1960, and thus could not possibly have been influenced by the December 15 meeting (App. A to Tr. pp. 76-77).

which the Government is no more immune than others." *United States v. Yellow Cab*, 338 U.S. 338, 341.

3. **The cases involving *per se* restraints are inapposite.**

Appellant places great reliance on *United States v. Parke, Davis & Co.*, 362 U.S. 29, but that analogy is "misleading" and "deceptive" here, just as it was in the *White Motor* case, 372 U.S. 253, 266, 268 (concurring opinion). The crucial difference is that the individual vertical agreements spelled out by the Court in *Parke, Davis* were illegal *per se* because they involved resale price maintenance in the absence of the statutory exception (362 U.S. 45-47). As a result, the "understandings" between manufacturer, wholesalers, and retailers in *Parke, Davis* were agreements to achieve an unlawful purpose—the enforcement of the underlying illegal vertical price-fixing agreements. See *Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv.L.Rev. 696-698 (1962).

In contrast to *Parke, Davis* and the other *per se* cases relied upon by appellant (J.S. 13), the basic provision of the vertical agreement involved here is the location clause which was upheld as reasonable in *Boro Hall Corp. v. General Motors Corp., supra*, and which is a minimal restriction essential to the operation of a franchise plan. This clause was originated by General Motors for its own business purposes almost a quarter of a century ago and is uniformly included in all its Dealer Selling Agreements (Tr. 333-334, 556). There is no valid parallel between General Motors' efforts to secure dealer compliance for

its own purposes with this valid, long-standing restriction and Parke, Davis' role as the "organizer of a price maintenance combination" through a series of individual agreements, each one illegal *per se*.

In his oral opinion, the District Judge correctly held:

> "Since General Motors was legally entitled to enforce its contracts, the mere urging of some of its dealers for assistance would not seem to change an independent action by General Motors into a combination or conspiracy." (J.S. App. A, p. 9a)

No case holds that a manufacturer is paralyzed and cannot seek compliance with lawful marketing agreements because a group of dealers may ask him to do something about violations by other dealers of a provision contained in each dealer's agreement. There is no such doctrine of "automatic" conspiracy. *Cf. United States v. Twentieth Century-Fox*, 137 F.Supp. 78, 90-92 (S.D. Cal. 1955).

The distinctions between this case and *Interstate Circuit Inc. v. United States*, 306 U.S. 208 (cited J.S., 13) are illuminating. The action taken by the motion picture distributors in that case was "a radical departure from the previous business practices," taken without "any persuasive explanation." 306 U.S. at 222-223. Moreover, the distributors failed to call as witnesses any of the officials who were in a position to know of the existence or non-existence of the alleged conspiracy. *Id.* at 221.

Here, the action taken by General Motors was entirely consistent with its desire to preserve its franchise plan which had been developed over a 40-year period.

The responsible General Motors officials all testified at length to facts showing that the action was taken independently by General Motors for its own persuasive reasons of business policy. This was not speculation; it was what substantial and uncontradicted evidence showed. The District Judge heard witnesses who are probably as well informed as anyone in the automobile industry testify on this precise point and he believed them.

In sum, what appellant asks here, as it did in *Yellow Cab,* is that this Court "try the case *de novo* on the record, reject nearly all the findings of the trial court, and substitute contrary findings" of its own. 338 U.S. at 340. As the Court said in that case:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design." (338 U.S. at 341-342)

CONCLUSION

For the foregoing reasons, the motion to affirm should be granted.

Respectfully submitted,

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